No. 648

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

MARVIN IRVING TAMARKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D.C.

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OPINION BELOW

The opinion of the Court of Appeals (R. 72-77; Pet. App. A, 1-6) is reported at 260 F. 2d 436. A previous opinion of the Court of Appeals is reported at 243 F. 2d 108.[1] The opinion of the District Court (R. 4-9; Pet. App. B, 1-5) is not reported.

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[1] In *Tamarkin* v. *Selective Service System, Local Board No. 47*, 243 F. 2d 108 (C.A. 5), certiorari denied, 355 U.S. 825, it was held that, after the petitioner had been classified I-A and denied conscientious objector classification, he was properly denied a preliminary injunction against further procedure by the local board. His contention was that he was entitled to a new physical examination and a 21-day waiting period between a re-determination of physical fitness and the date of induction.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1958 (R. 78). A petition for rehearing (R. 82-84) was denied on December 17, 1958 (R. 98). The petition for a writ of certiorari was filed on January 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a basis in fact for the selective service boards to classify the petitioner 1-A (available for military service), instead of granting the conscientious objector classification sought.

2. Whether, after the reopening of the petitioner's 1-A classification, he was denied procedural due process, when not granted a second pre-induction physical examination and a second 21-day waiting period prior to induction.

STATUTES AND REGULATIONS INVOLVED

Sections 6(j) and 12(a) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j) and 462(a)), the pertinent Regulations of the Selective Service System, and a National Headquarters Memorandum addressed to the Local Boards are set forth in an Appendix to this brief, *infra*, pp. 13-19.

STATEMENT

The petitioner was convicted, in a trial without a jury in the United States District Court for the Southern District of Florida, for refusal to submit to an order for induction into the armed forces of the United States. He was sentenced to imprisonment for a

period of 12 months (R. 2-3, 4, 12-13). On appeal (R. 13-15), the judgment was unanimously affirmed (R. 78).

Pertinent facts shown by the petitioner's selective service file, which was introduced in evidence as Government Exhibit 1 (R. 56-57), are as follows:

On November 13, 1950, the petitioner filed with Local Board No. 47 in Miami, Florida, his classification questionnaire in which he stated he was born on July 26, 1930 (F. 6).[2] After being classified 1-A (available for military service), the petitioner on January 3, 1951, filed with the local board his special form for conscientious objectors (SSS Form No. 150). In this form he stated that he was "conscientiously opposed to the taking of life, whether animal or human, for any purpose whatsoever," and that he believed that his allegiance to the "Eternal Laws of Nature" superseded "man made laws, when the latter involved the taking of life" (F. 133). He mentioned that he had been raised from birth by his parents as a "strict Vegetarian"; that as Secretary of the Vegetarian Society of Greater Miami, he had occasion to voice the principles of this "official body of Vegetarianism"; and that he was a member of the American Vegetarian Union (F. 134, 135). With his SSS Form No. 150 the petitioner submitted a number of pamphlets explaining the principles of Vegetarianism (F. 144, 145, 146, 147). In a publication by the Vegetarian Society of Miami, of which the petitioner was secretary, an article by Dr. I. Shmid entitled "Now Become a Vegetarian," states in part: "There are other advantages in becoming a Vegetarian also. The

[2] The selective service file, a copy of which we are filing with the Court, will be referred to by the designation "F. ——" for the pages numbered in pencil.

Vegetarian is an idealist, a seeker of truth in many fields of human endeavor. He is a lover of life, a humanitarian. He is a social-being. He is brother to all living creatures. He is a friend to all races and nationalities. He strives to live peacefully. He believes in equality for all. He is a lover of nature, an admirer of all the inhabitants of nature" (F. 145-[2, 3-4]). The preamble of the tenets of the Miami society reads in part: "Animal flesh-eating with its attendant slaughter and agony, is revolting to the conscience of mankind. Man's evolutionary intellect precludes murder and misfortune of others in the scheme of his life" (F. 145-[4]). Among the stated aims and objectives of the American Vegetarian Union are "1. To promote the Vegetarian philosophy of life. * * * 3. To emphasize particularly the tremendous influence the application of this philosophy will have on our social and economic life. * * *" (F. 146-[8]).

After a number of administrative orders which are not pertinent here, on April 7, 1954, the petitioner was classified I-A by the appeal board (F. 2), and was continued in this I-A classification by the local board on April 13, 1954 (F. 13). The petitioner passed his pre-induction physical examination on May 13, 1954, and a certificate of acceptability was mailed to him on May 21, 1954 (F. 104, 103, 13). On July 30, 1954, the local board mailed to the petitioner an order to report for induction on August 18, 1954 (F. 101, 13). The petitioner refused to be inducted and was reported to the United States Attorney as delinquent (F. 100, 13). In a letter received from the United States Attorney by the local board on September 19, 1955, prosecution was declined (R. 94, 14). The reason was that the

petitioner had not been furnished with a fair résumé of the investigation of his background as made by the F.B.I. (F. 94).

In a letter from the State Headquarters of Selective Service received by the local board on September 21, 1955, it was stated that although the petitioner could not be prosecuted because of the failure to provide the résumé "* * * the Regulations permit you to reopen and reconsider registrant's classification anew" (F. 94).

On October 20, 1955, the local board in reviewing the petitioner's file "agreed to Reopen" his classification, continued him in I-A, and mailed him Form 110 as notice of this classification (F. 14). The time for appeal was extended by the selective service authorities; and on November 18, 1955, the petitioner took an appeal from the I-A classification (F. 14-15). The following entry appears on the minutes of the petitioner's file for January 12, 1956 (F. 15):

> Appeal was read and considered by the board. Following discussion the members voted unanimously not to reopen classification and clerk was instructed to notify the registrant accordingly by letter, and to forward the file to the appeal board for further review.

The petitioner was advised that the local board declined to reopen his classification and his file was forwarded to the appeal board (F. 15).

In the Department of Justice recommendation to the appeal board dated May 25, 1956 (F. 58-64), the reviewing officer points out that the résumé of the inquiry shows that the petitioner "apparently objects to noncombatant training and service because he does

not believe the military would recognize his status as a noncombatant and would nevertheless train him to kill and because he feels the inoculations would be harmful to him" (F. 61). The résumé also indicated that while persons interviewed generally believed that the petitioner treated Vegetarianism as a religion, many vegetarians considered it to be merely a philosophy (F. 61). The hearing officer found that the petitioner's sincere convictions amounted to a religious belief, and recommended that his claim as a conscientious objector should be sustained. The reviewing officer, however, thought that the views upon which the petitioner based his claim were "essentially philosophical and involve a merely personal moral code" under Section 6(j) of the Universal Military Training and Service Act (*infra*, p. 13), and recommended against sustaining petitioner's claim (F. 63, 64).

On July 2, 1956, the appeal board by a vote of 3 to 0 classified petitioner 1-A (F. 5, 16). On July 6, the local board mailed the petitioner an order to report for induction on July 23, 1956 (F. 42, 16). On July 13, 1956, the petitioner wrote the State Director of Selective Service stating that under the regulations he was entitled, by reason of his new classification, to another physical examination and to a delay of induction for 21 days thereafter (F. 39-41). In a reply dated July 16, 1956, the Deputy State Director pointed out that the petitioner had been given a pre-induction physical examination on May 13, 1954, and that a certificate of acceptability had been mailed to him on May 21, 1954; cited Local Board Memorandum No. 28, Paragraph 2(a), issued by the National Headquarters Selective Service System (*infra*, p. 18), providing that a registrant in the petitioner's position could be ordered to

report for induction and be examined at the induction station; and stated that the petitioner would be expected to report for induction as ordered (F. 38).

On July 23, 1956, the date designated for his induction, the petitioner was given a physical re-examination and found acceptable (F. 25, 26, 32). On that same date he refused to be inducted into the armed forces (F. 23; R. 3-4). His prosecution thereafter followed (F. 16). At the trial in the District Court the petitioner testified that he believed in a Supreme Being as the Spirit of God, and that he considered Vegetarianism a religion. In stating that Vegetarianism was based upon the Biblical commandment, "Thou shalt not kill", he explained, " do not kill animals to eat and I therefore am not disposed to kill humans for any purpose". He also referred to a verse in Genesis 1:29 to the effect that man's food should be vegetables (R. 60). When asked why he was conscientiously opposed to war, he replied that if he were "placed in a position to kill my fellow human beings, [he] would not be able to" (R. 61).

In holding the petitioner guilty, the District Court was of the opinion that it could not be said that there was "no basis in fact for the Selective Service Board's classification in this case, and they could, and did find, that the [petitioner's] beliefs were not of a religious nature." The court held that there was a basis in fact for the petitioner's 1-A classification, and that he had not been denied procedural due process by reason of the failure to receive a new physical examination and a 21-day waiting period prior to induction (Pet. App. B. 4, 5). In affirming the conviction, the Court of Appeals was also of the opinion that there was a basis

in fact for the board's classification and found it unnecessary to reach the procedural point for decision (Pet. App. A, 2-6).

ARGUMENT

1. The petitioner contends that there was no basis in fact, under *Estep* v. *United States*, 327 U.S. 114, for classifying him I-A (available for military service), instead of granting him the conscientious objector classification sought (Pet. 10-18, 24-26).

He argues that he was entitled to classification as a conscientious objector since his sincerity was unquestioned, and there was nothing in his selective service file incompatible with his claim to exemption. The record does not support this premise, however, since documents submitted by the petitioner with his SSS Form No. 150 (see the Statement, *supra*, pp. 3-4) are incompatible with his claim for exemption as a conscientious objector on religious, as distinguished from philosophical, grounds.

The petitioner seeks to avoid the unfavorable effect of these documents by stating that the reviewing officer of the Department of Justice, and presumably the selective service boards also, improperly considered them, even though they were interpretations by other vegetarians as to the true meaning of Vegetarianism instead of the petitioner's individual interpretation. These documents, however, were not produced by selective service authorities to disprove the petitioner's claim that Vegetarianism is a religion; rather, they were produced by the petitioner for the express purpose of proving his claim that Vegetarianism is a religion, which is a valid basis for a conscientious objector classification. One of the publications is by the Vegetarian

Society of Miami, of which the petitioner himself is secretary (F. 145). It cannot be said that the petitioner did not vouch for, and approve, these papers.[3]

These documents submitted by the petitioner show that Vegetarianism is a philosophy or personal moral code, rather than a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" under Section 6(j) of the Universal Military Training and Service Act (*infra*, p. 13). The preamble of the tenets of the Vegetarian Society of Greater Miami reading in part that "Man's evolutionary intellect precludes murder and misfortune of others in the scheme of his life" (F. 145-[4]) shows that the basis for the objection to killing is "Man's evolutionary intellect," a philosophical concept, not man's "relation to a Supreme Being", the religious concept embodied in Section 6(j). Among the stated objectives of the American Vegetarian Union are the promotion of the "Vegetarian philosophy of life" (F. 146-[8]). The petitioner in his SSS Form No. 150, moreover, states that when man-made laws involving the taking of life are in conflict with the "Eternal Laws of Nature," his allegiance is to the latter (F. 133), *i.e.*, to natural laws rather than to a religious belief in a relation to a Supreme Being.

Vegetarianism cannot be transformed into a religion within the purview of the statute merely because the petitioner sincerely professes to believe that it is such. As the District Court properly held, the petitioner "has not shown that he is opposed to 'participation

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[3] It is significant that the hearing officer found that the petitioner "bases his conscientious objections entirely and solely upon his convictions as a vegetarian *and upon his membership in the Vegetarian Society to which he belongs*" (F. 62, emphasis added).

in war in any form", but at best is by reason of dietary training and belief opposed to taking any type of animal life for food purposes, and secondarily because he believes that the vegetarian diet has support in religious words which indicate that killing of animals are wrong" (Pet. App. B, 4).

2. Neither is there merit to the petitioner's contention that, since he was given a new 1-A designation on October 20, 1955, upon the reopening of his classifiation, he was denied procedural due process because the local board failed to follow the regulations by not granting a second pre-induction physical examination and a second 21-day waiting period prior to induction (Pet. 18-24, 26-31).

The Court of Appeals did not find it necessary to decide this procedural point, since upon the record the court did not find that there had been a reopening of the petitioner's I-A classification on October 20, 1955, within the meaning of 32 C.F.R. 1625.2[4] (Pet. App. A, 4-6). The petitioner strongly contests this view by insisting that there was a reopening of his classification. The record is unclear as to precisely what occurred, but the entries dated October 20, 1955 (F. 14), support the petitioner's contention that there was a reopening and classification anew. However, even if the petitioner's version is accepted we do not think it can be said that the regulations were not followed.

It is undisputed that the petitioner passed his pre-induction physical examination on May 13, 1954, was mailed a certificate of acceptability on May 21, 1954, and was mailed an order to report for induction on

[4] The selective service regulations hereafter referred to are set out at pp. 15-18, *infra*.

August 18, 1954 (see the Statement, *supra*, p. 4). There is thus no dispute about the fact that he has had a pre-induction physical examination and a 21-day waiting period many days before the order to report for induction on July 23, 1956, upon which his conviction was ultimately based. There is no requirement in the statute or the regulations that there be a new physical examination and a new 21-day waiting period each time a registrant's classification is considered by a selective service board. To the contrary, the memorandum issued by the National Headquarters Selective Service System (*infra*, pp. 18-19) provides that physical examinations shall be valid for 120 days, and that when more than 120 days have passed, as in this case, a registrant shall be ordered to report for induction at which time he shall be given a new physical examination.[5] The terms of this memorandum are controlling and dispositive of the petitioner's argument. It is significant that the petitioner does not claim a physical disability which would make him ineligible for military service, and that he was in fact given a physical re-examination and found acceptable on July 23, 1956, the date upon which he was ordered to report for induction (F. 25, 26, 32).

The petitioner's argument attempts to read into the framework of the various regulations requirements which are neither expressly nor impliedly included. Under the regulations referring to classification anew, 32 C.F.R. 1625.12 provides for the mailing of a new Notice of Classification (SSS Form No. 110); and 32 C.F.R. 1625.14 provides for cancellation of the old Order to Report for Induction (SSS Form No. 252) before a

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[5] Cf. *Mason* v. *United States*, 218 F. 2d 375 (C.A. 9).

new order is mailed. The purpose is obviously to make certain that the new classification is given a full review such as the petitioner had in this case.

None of the regulations, however, contains a provision that, upon classification anew, a previous preinduction physical examination, and the certificate of acceptability (DD Form No. 62) mailed to a registrant pursuant thereto, should be cancelled so as to necessitate repetition of the procedure. If it had been the purpose of the regulations to require this, as the petitioner contends, it is reasonable to infer that express provisions to this effect would have been included, as they were in the other instances mentioned.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

FEBRUARY 1959.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the

local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse

to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C.F.R. 1625.2:

When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification: provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

32 C.F.R. 1625.4:

Refusal to reopen and consider anew registrant's classification. When a registrant, ~~any~~ person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

32 C.F.R. 1625.11 provides:

Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

32 C.F.R. 1625.12 provides:

Notice of action when classification considered anew. When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

32 C.F.R. 1625.13 provides:

Right of appeal following reopening of classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

32 C.F.R. 1625.14 provides:

Order to report for induction to be canceled when classification reopened. When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.

32 C.F.R. 1628.10 provides:

Who will be examined. Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or

interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination.

32 C.F.R. 1631.7 provided in pertinent part:

Action by local board upon receipt of notice of call. (a) Each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: * * *.

National Headquarters Selective Service System, Local Board Memorandum No. 28, issued Dec. 28, 1950, amended March 12, 1957, provides in pertinent part:

1. *Period of Validity Under Paragraph 18a, AR 601-270.*—Paragraph 18a of Section III of Army Regulations No. 601-270 provides in pertinent part as follows:

18. *Scope of induction processing.*—a. Selective Service registrants found acceptable for military service normally will be ordered to report to induction stations in not less than 21 and not more than 120 days after the preinduction examination. If the lapse of time between the preinduction examination and the appearance of the registrant

for induction is more than 120 days, another complete physical examination is required to determine acceptability and immediate induction thereafter, except as provided in (1) * * * below—

* * * * *

2. *Action by Local Board.*—(a) Except in the cases of postponed registrants, the 120-day period of validity continues in effect for armed forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be immediately inducted.

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